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## Panel One - McCain-Feingold: Present and Future

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## PANEL ONE

### MCCAIN-FEINGOLD: PRESENT AND FUTURE<sup>+</sup>

DIANA NOBILE, LEAD ARTICLES EDITOR, *CATHOLIC UNIVERSITY LAW REVIEW*: I'm proud to introduce our first panel, which will focus on the Bipartisan Campaign Reform Act of 2002—McCain-Feingold. Our first panelist is Laura MacCleery, a Deputy Director at the Brennan Center for Justice at the New York University School of Law.

Our second panelist is Mr. William McGinley, of counsel at Patton Boggs. Mr. McGinley advises federal and state candidates, political party committees, political action committees, donors, political vendors, and grassroots lobbying and issue advocacy organizations regarding accounting, finance, tax, corporate, ethics, and broadcasting finance issues.

It is my pleasure to introduce our moderator, Marshall J. Breger, Professor of Law here at The Catholic University of America, Columbus School of Law. At this time I would like to turn the discussion over to Professor Breger.

PROF. BREGER: Well, thank you. Our plan is that each of the speakers offers a fifteen-minute summary of the paper they prepared for the Law Review Symposium. Then I am going to ask some questions and then hopefully you, the audience, will join in. Our first speaker is Ms. Laura MacCleery.

MS. MACCLEERY: Well, thank you so much Professor Breger, Dean [Stacy] Brustin, Reverend [Raymond] O'Brien, and Diana [Nobile] and David [Schumacher] for putting together this panel. It was terrific to hear the keynote of Mr. Baran, which really teed up a lot of the issues that we will cover here.

I've worked in the Brennan Center for a little more than a year, and I love talking to students because I really enjoy having a career in nonprofit advocacy work. Before working at the Brennan Center, I worked for eight years in another nonprofit consumer advocacy organization, Public Citizen, and I think working on issues of such difficulty as campaign finance—whatever your perspective on the issues—or other issues of constitutional complexity, is an incredibly rewarding way to have a legal career. Whether you do it in a firm or at a nonprofit or advocacy group, I always recommend to students that they think deeply about the jobs that they will pursue after law school and follow

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<sup>+</sup> The text appears substantially as it was transcribed on January 23, 2009 at The Catholic University of America, Columbus School of Law. The views and opinions expressed herein are those of the panelists, and do not necessarily represent the views and opinions of the *Catholic University Law Review*; The Catholic University of America, Columbus School of Law; or any organization with which the panelists are affiliated. William McGinley's comments constitute his personal views on the topics discussed and not those of any client, or any other individual or organization. Mr. McGinley participated in the Symposium panel in his personal capacity and not on behalf of any client.

their heart because it can be incredibly interesting to be able to do this kind of work.

I'll next make some general remarks about why I believe in campaign finance reform. Because oftentimes the constitutional concepts are so abstract, the advocates can talk past each other. The work that I did at the consumer advocacy group Public Citizen concerned a lot of different issues, but one of the issues that I worked on was improving vehicle fuel economy. For years we tried to get Congress to better regulate the fuel economy of vehicles on the road. We tried for more than a decade. There were bills that came up every congressional session. The auto industry employed over a million people; millions more jobs depended on it and so it had an enormous amount of impact even without campaign contributions. But with the addition of campaign contributions, it seemed impossible to get anyone to take the long view, and there were consequences associated with this. Not the least of which was the lack of competitiveness for the domestic industry. There were laws on the books that were supposed to require improvements in fuel economy year in [and] year out, and yet there were none. It is from this experience—looking at this distortion of public policy and how Congress really cannot serve the public interests—that I came to believe in campaign finance reform. The conundrum of a democracy is really the tension of how you deal with the incredible concentration of capital that comes about in the context of a democracy—how you grapple with the economic power exercised by those interests—and assure that the people who are making the long-term and hard decisions are doing so from a genuine public policy perspective, are doing so having faced the music, as it were, both politically and as to policy matters.

So I came to this work, I came to [campaign] finance with that kind of legislative advocacy [background], and with this frustration about seeing bad decisions get made or good decisions not get made. The decisions, such as the one on fuel economy, got delayed, and delayed, and delayed until looking at the headlines last fall, it's almost too late to fix what should have been fixed ten years ago when the economy was good, and when there was money to spare.

My paper is a close look at the organizing efforts and financial incentives and their relationship to the monetary incentives provided in campaign finance reform and the law. It is called *Goodbye Soft Money, Hello Grassroots* and in it, I argue that when the Bipartisan Campaign Reform Act or BCRA or McCain-Feingold—it's known by both of those short names—was enacted, it exacerbated and accelerated an existing background trend where the parties and the candidates were moving away from these huge pots of soft money, given by corporations or unions or individuals in some cases, and moving more toward small donor and individual contributions.

When you combine that with the low incremental cost for contributions that can be yet gleaned through the Internet as a development in technology, BCRA both laid the groundwork and took away the incentives for the parties to keep

seeking soft money donations. And it pushed the parties into a much more grassroots-based operation, which was how they campaigned before, and yet had moved away from in the nineties, with both parties competing for essentially the same soft money dollars and the corporations. Many of these corporations were part of the push to enact BCRA, because the soft money contributions had essentially become a kind of baksheesh. The corporations recognized they would have to give not only because they wanted to make sure that their agenda was heard, but because they were scared of what would happen if they didn't give—that they'd be locked out of the room because the next guy, their corporate competitor, would be sure to participate.

So there was this kind of imperative that corporations cough up soft money and, after BCRA came into play, there was some money that went into independent expenditure groups and where there was additional spending, but by and large what studies have shown is that when the incentives went away for the corporations to give the soft money, they got out of the soft money game and that most corporations got out and stayed out.

As the political parties were so dependent on soft money, it was predicted that they would suffer greatly. Mr. Baran's keynote address made a point that it was sort of cynical that the Democrats in Congress voted for BCRA, overwhelmingly pushed the law, because they thought it would help incumbents, and Mr. Baran named a number of ways in which he thought it would advantage incumbents. But I can show you—I brought this article [panelist presents exhibits to audience] because it's usually a good exhibit—there was a prevailing view at the time which was that BCRA was, in a phrase, “the Democratic Party suicide bill.” Everybody bought into it—because the Democrats' dependence on soft money was such that it was believed that BCRA would actually hurt them considerably.

Instead it has turned out that they replaced all of the soft money that they used to gather, and more, with hard money—with regulated money in increments from individuals. In order to do that, they've had to change the way that they solicited contributions. It became a much more grassroots enterprise.

This shift really was quite powerful. Also, BCRA increased the individual contribution limits from \$1000 to \$2000, which was another incentive—an additional incentive if you will—to go out and invest in a grassroots network which I think has transformed the financial electoral process and led to a much more exciting election in 2008. This was something that felt very different—and bottom up instead of top down—in terms of which donors were important to the candidates, and who mattered on both sides in terms of the parties and the presidential election. So that's the thesis of the paper, and I'll just point out that one of the things that the *McConnell* Court, when it reviewed the constitutionality of the Bipartisan Campaign Reform Act, said was that it wasn't only that there was an interest in preventing corruption. It recognized that there is an interest in having robust public information about who is

seeking to influence campaigns and that there are “competing constitutional values”—including an interest in fair, informed, and participatory democratic decision-making. That’s the kind of robust interest that we are excited about when we look at the small donor revolution and when we look at the changes that BCRA has brought about.

MR. MCGINLEY: My name is Bill McGinley and I’m of counsel with the law firm of Patton Boggs LLP, and as was stated in the introduction, my practice area largely focuses on party committees, candidates, political action committees, and grassroots lobbying groups.

One of the things that I’m going to try to focus on today with respect to McCain-Feingold—or I will also refer to it as BCRA—is the myth versus the reality; and if we’re going to talk about the past, the present, and the future of this law, I think we need to have a baseline understanding of the impetus that brought about the law—some of the realities of the political participants that existed immediately prior to the enactment of this law. Primarily, I would like to focus on the political parties today. A lot has been made by the reform community that the national party committees were raising large sums of money and that they were getting corporations and wealthy individuals to make large donations to the national party committees. One of the things that you need to bear in mind is that the people at the Republican National Committee made substantial investments in their low-dollar donor program, and this was not only going to be done through fundraising events, but it was also done through its direct-mail program. So if you look at the average donation to some of these national party committees, the average donation was quite small, because of the size of the small-dollar donor base that they had developed over the years by making the substantial investments. These were individuals who contributed small-dollar amounts similar to those received by the Obama campaign—\$25 donations, \$50 donations, \$100 donations, \$200 donations, and these monies were spent on federal campaign activities.

What also happened at the national party committees—and this was true at the DNC and the RNC—was that they were maintaining not only the federal account that was fully regulated by the FEC, but they were also maintaining accounts that permitted these national party committees to participate in state elections across the nation. These were monies that were regulated by the applicable state law—contribution limits, disclosure requirements, and some of the other requirements that go into the campaign finance regime. These national party committees were maintaining twenty-five, fifty accounts where they had to basically deposit these monies into different state accounts that were disclosed to the state election agency so that the national party committees could support the local candidates and the state candidates. Under many state regimes, the federal money was not recognized. There were many instances where, because the federal money was reported to the FEC and it wasn’t reported to the state agency, they weren’t eligible to use it in the state. Are there some states that permitted unlimited donations? Yes. Were the

national party committees accepting some larger donations? Were they able to use those donations to pay the nonfederal share of their allocable expenses, such as building expenses, staff, and other overhead expenses? Yes.

And something else that came out of the FEC was an advisory opinion regarding issue advocacy advertisements sponsored by party committees—communications that did not expressly advocate the election or defeat of a candidate. The ads didn't say vote for, vote against, support, oppose, etc., the specific candidate, but as we saw during the Clinton years, there were large, robust debates between the party committees on issues of importance of the day.

We all remember the government shutdown. We remember the deficit. We remember some of the other issues that the parties were debating at the time and you saw the Democratic National Committee running advertisements on the split, without advocating the election or defeat, that were paid for with a mixture of both hard money and soft money. And the theory behind this, from the FEC advisory opinion, is that these types of advertisements—these types of policy advertisements—that discuss important issues of the day impact races up and down the ticket. They can affect anything from dogcatcher to state legislator, to governor, member of the House, member of the Senate, President of the United States.

And that sometimes the policy tone that is set in the federal government bleeds down into the states. If you remember through the Clinton years, federalism was a big question. What is the ability of the federal government to impose unfunded mandates on the states? Congress passed a bill saying the states were required to do this but they didn't allocate the funding for them. And soon, some of these issues were great policy debates between the two political parties—but particularly during the 1996 election. So what happened? Basically, what happened was that the national party committees were running these advertisements and, as Mr. Baran pointed out in his keynote address, incumbents don't like to be criticized. Laura [MacCleery] just mentioned that one of the things that the reform community is looking for, and I think we all agree on this point, is that incumbents need to be held accountable for their decisions. That the citizenry and all the interested parties—the stakeholders in the debate—have the opportunity to express their views. When the incumbents make the decision to pursue a policy that means that the party committees, the grassroots lobbying groups, citizen groups, consumer advocacy groups, and the rest of the stakeholders get to hold [the incumbents] accountable for their decision. They get to praise the decision. They get to criticize the decision. They get to say, "Here is where you need to tweak this policy at the edges." What happened with these advertisements is that the incumbents didn't like them. There were a number of incumbents who were heavily criticized.

I'll never forget one of the DNC advertisements that was showing, basically criticizing, then-Senate Majority Leader Bob Dole, who was going to be the

Republican nominee for president, and then-Speaker [Newt] Gingrich. And if you remember, there was the budget shutdown and the DNC runs this advertisement showing Senator Dole and Speaker Gingrich in grainy black and white footage—they're just the evildoers that are conspiring to shutdown the government. Cutaway to President [Bill] Clinton and Vice President [Al] Gore in the Oval Office and all of a sudden it's like something out of a fairytale. There are birds chirping in the trees outside the window, full-light color film and, basically, what some of the critics were saying was that this was an unfair attack. That this was an advertisement that was designed . . . to do nothing more than to diminish support for Senator Dole's candidacy and increase support for President Clinton's re-election candidacy.

During the audit of these presidential campaigns—and this was one impetus for BCRA—there was huge debate about this because the campaigns at that time were taking taxpayer money for the general election. There was a mandatory audit. The auditors go in and they examine both campaigns and then they take a look at the national party committees because the committees have a certain amount that they can spend on their candidates. But the auditors also examined the issue advocacy advertisements sponsored by the national committees. The RNC ran issue ads. The DNC ran issue ads. There was an advisory opinion from the FEC that said this was permissible, but the reform community and some members of the Commission just didn't like it. And so they started using what I like to call a scratch, sniff, feel test to determine if the ads were appropriate. If it looks like a campaign ad, it kind of feels like a campaign ad, and it probably has some type of impact on the campaign, it must be a campaign ad, right?

Well, ultimately the FEC punted on this issue and that was from the 1996 election. Coming into 2000, we saw that the same thing was happening again and once again we saw it in the primary field. We saw it in the general election field and as a result of this election, in the second go-around where party committees were discussing issues of national importance, the reformers and those sponsors of the bill decided to put forward the Bipartisan Campaign Reform Act.

So what were the basic tenets of this Act? If you take a look at what was done in the past, BCRA basically tried to drive a wedge between political party committees, federal candidates and officeholders, and outside groups.

All of a sudden you have strict coordination rules. Campaigns could not discuss communications within a certain time period with their party committees. When you have the national party committee that is basically looking out for its candidates across the nation at all levels of government—suddenly you're going to drive a wedge between the officeholders and the candidates that are party adherents, people who are running on the ticket because they're basically giving the voters shorthand information to say this is the platform they believe in, but they can't communicate with the party about the content of that communication, especially if a preference is made.

The other thing that happened with BCRA is that it placed further restrictions on the state parties and county parties—which is really where the grassroots operate, where the rubber meets the road. It federalized a lot of election activities that properly belong within the state election law realm. Suddenly these state and local parties are subject to FEC jurisdiction, FEC regulation, FEC disclosure requirements, and FEC funding restrictions on basic campaign activities that the party committees have traditionally performed with state dollars. It affects voter registration, for example.

The state and local party committees are also now subject to activity restrictions on federal candidates and officeholders and their appearances at state party fundraising events where they're raising money, not for the federal account, but for the state account to help support the state candidates.

It affects county party events—many county parties do not have a federal account that is regulated by the FEC where they can engage in federal election activity. Federal officeholders are reluctant to show up at county party events where they're raising money, because of the soft money ban. Even though BCRA does provide some technical guidance that permits them to do it, a lot of people just stayed away.

It affects outside groups. You have outside groups that are lobbying the Hill—and the second panel will get into the constitutionality of petitioning the government—but you also have outside groups that also want to make their case directly to the people. And they sponsor ads regarding legislation of particular importance. So, suddenly, they're facing all sorts of campaign finance restrictions. Congress sometimes meets during the time period immediately after an election. How many times have we seen that Congress is in session immediately preceding an election? When are people most likely to pay attention to the important issues of the day? Right before the election. They're examining candidate positions on issues. They're examining candidate qualifications on issues. But they're also paying attention to what's happening in Washington, D.C. And the people that they're voting on are about to come into session—the incumbent members are about to vote on some of these important issues.

For example, one of the issues may be about bailout legislation—so what is the tension there? When a group wants to say: "Wait a minute, you're about to regulate an activity, or you're about to prohibit an activity, or you're about to go laissez-faire on an activity, and we don't think that's right." And the group identifies an officeholder who supports that position and they believe the public should call and tell the officeholder how they feel about this. Suddenly, under the *Electioneering Communication* ban—which some people call the blackout period—you couldn't do that. And so there are a number of issues in the present. I believe the present is a transition period. BCRA has been in existence now for a couple of cycles, and groups and individuals are beginning to feel the effect of the law.



We're seeing a number of cases that have worked their way through the courts, whether it's the electioneering communication case—*Wisconsin Right to Life*—or if it's the Millionaire's Amendment issue in the *Davis* case. But there are also some other current cases such as the RNC lawsuit challenging the national party soft money ban. The RNC has said: "We want them to do the state elections again with state regulated funds. We want to be able to use state permissible money in the same way that unions can, in the same way the corporations can, and the same way that coalitions of state officeholders can. We think we have that right."

The RNC also wants to go after the coordinated expenditure limits. Coordinated expenditure limits are basically the money that a political party can spend on behalf of its nominee—they get *X* number of dollars and it can be spent on anything from electrical bills, to office rent, to advertisements. These funds are spent in full coordination with the federal candidate and are permissible expenditures, regulated by the FEC and reported to the FEC.

What do I think the future is? I think the future under BCRA is going to decentralize the political marketplace unless something happens. Back in the 1970s, a professor wrote a great article—and I'm sorry I can't remember the name of the title—but he talked about the value of the political parties and how the political parties have a moderating influence on political discourse.

National party committees are made up of all sorts of factions that represent different types of constituencies. These coalitions are regional in some cases—whether it's the coalitions in the northeast versus the coalitions in the south versus the coalitions in the midwest versus the coalitions out west. Different issues, different priorities, but they all make up the coalitions that make up the political party committee.

And he talked about how the parties have a moderating influence on political discourse, and that the greatest threat for corruption is the single-interest interest groups. One of the effects of McCain-Feingold is that it's taking the money out of the party committee system and giving it to the single-interest interest groups. And so you'll see more ads on targeting someone on a single issue. For example, take the case of "McGinleys For Life"—and this organization will run advertisements supporting or opposing the positions of officeholders or candidates by talking about pro-life, or pro-abortion, or pro-choice issues.

It's a single issue. They don't care about anything else and they are going to drive it home. And the people that they talk to about this are the people who are going to exert influence on that particular issue, as opposed to a political party committee that needs to look to the positions of multiple candidates in the northeast, in the west. Are they any different than the positions of the candidates in the south and the midwest? What I think what we're going to see is that the political power and the money will continue to decentralize away from the political parties in favor of these single-interest groups, not to

mention the rise of the blogosphere and some of the other technologies that are coming about, the social networking sites, etc.

I think that the political parties have a real challenge and I believe that one of the issues that the legislature and the courts need to consider is: Do we want to continue to be a two-party system? Or do we want to be balkanized into single-interest groups where people and groups are operating more on the extreme and are not subject to the moderating influence of the parties?

PROF. BREGER: Thank you very much. I think it's clear that our conversation is touching on three themes: constitutional issues, statutory issues about BCRA mechanisms of compliance (so how do I allocate this money? Is it hard? Is it soft? Is it state? Is it federal and if I'm stuck because I have too much federal, can I somehow reallocate it to state and then use it?), and then the empirical reality of campaign finance. And while our conversation has moved from one issue to the other; we need to keep all three in mind. I am going to start with a couple of questions for Ms. MacCleery, and then I hope Mr. McGinley will comment.

I was struck by your focus on small donors, and the suggestion that between the Internet and the small donor we have solved the problem of big money politics. I wonder if it's really true. Michael Malbin, as I think you know, has pointed out that the percentage of small donors for Obama was the same percentage as the small Bush donors in 2004.

So while the amounts are different this time around, the percentages are the same; and I suppose there is an argument that you need an irreducible minimum to fund a campaign. So if you can get that irreducible minimum by small donations you don't need the big donations. But if the irreducible minimum has grown to \$750 million, you may still need those big donors. So I wonder if the game has really changed.

And also I wonder what kind of regulation you think is needed for small donors. There was a concern about foreign contributions slipping in under the small donor "radar screen" because under a certain amount of money the small donors do not have to be identified or can easily be misidentified.

And then thirdly, I asked you to talk a bit about the role of big donors in your small donor utopia. Certainly the Obama campaign benefited from big donors, and benefited as well from an often separate group—bundlers. Because if you have a campaign contributor—a hard money donor, so to speak—you often need a different class of persons either who bundle the hard money contributions or who can be recruited to raise and bundle hard money. Not every rich person has friends he or she can call upon.

Several functional purposes are served by grassroots small-donor recruiting—getting money from people who the campaign wouldn't otherwise be able to reach. Nonetheless, it is worth asking whether we are getting too overexcited about the possibility of small donors changing the world of politics.

MS. MACCLEERY: I think that is one of the key questions right now in campaign finance, and, looking at the future, I think it's one of the key issues about the 2008 election. Of course, one of the things that hampers our analysis at this particular moment is that the campaign finance data that are available haven't been thoroughly cleaned and processed.

So we're waiting for groups like the Campaign Finance Institute to tell us about the presidential election numbers. Although all the excitement was at the presidential level, other questions are what did we see in congressional elections, and in state elections. There are a lot of good questions to be asked about the extent of these changes.

This is one of the things that is so exciting to reformers about this—Mr. Baran talked about this pretty famous quote about the relationship between money and speech and this analogy of a tank of gasoline, which suggests that you need a tank of gasoline to go down the road and that in just the same way, money facilitates speech.

But that linear relationship—the idea that one tank of gas gets you so far—is really transformed by the Internet. There's very few, if any, costs associated with communicating to more people with this technology.

You really do start to push on this notion of how much—how closely connected is that relationship between money and speech and is it going to stay that way into the future? Are we really saying that communication costs will stay the same? We know that, in the 2008 election, a substantial amount of money was collected for the use in broadcast advertisement—and certainly we're not looking at the end of television advertising.

So I don't want to overstate it, but these developments do trouble this notion of an easy equivalence between money and speech. I also want to discuss the available numbers on contributions. Everybody in the reform community got really excited, and I think you saw this in the press over the course of the election by the high percentages of small donors, that is donors under \$200, who I would really call micro-donors.

Those are people who are donating very incremental amounts. Those were in the fifty to sixty percentile. Then, when Campaign Finance Institute took a hard look at the numbers after the close of the election in late November, what they found was there were a lot of people who ended up bumping themselves over that \$200 mark as they gave \$30 and then \$20. It was very easy to go from a micro-donor level, to one above the level at which people had traditionally been recognized as a small donor. So when they went to crunch the numbers they found, surprisingly, that the actual percentage of people who were not repeaters—those who had just given \$200 or less in the Obama campaign—was twenty-six percent and when this was compared to President Bush in 2004, his small donors were twenty-five percent.

So what happened to the small donor revolution? Well, one answer is that twenty-five percent of \$400 million is a lot bigger of a number than twenty-six percent of \$150 or \$160 million. So if you look at the absolute numbers you

do see that there has been a substantial increase in new donors and small donors. Many new donors were the micro-donors brought into the campaign finance universe for the first time. One of the things that has been troubling about campaign finance over the years has been that there is only a tiny percentage of the population that actually gives any money at all to the candidates. And so the idea that you're changing habits—that you're actually getting new people to get engaged—is something quite significant. It's also much easier to go back to somebody who has already written a check once and get more money from that person than it is to get somebody new.

The other thing that happened in the campaign—and again this was a bipartisan development across the different campaign organizations—was that the donation function became integrated into a much more meaningful structure for organizing in the campaign generally. They developed all of these Internet tools. I'm familiar with the Obama campaign's, which had the neighbor-to-neighbor tool in which people could volunteer time and call neighbors in other states and I think it was a similar consolidation . . .

PROF. BREGER: Excuse me, if they are neighbors are they really to be found in "other" states?

MS. MACCLEERY: Well "neighbors." However fictional the construction of calling people, the volunteers were assigned neighboring states in the database. So they were doing sort of person-to-person, human-to-human contact and recruitment at a level that they rarely could have achieved in previous elections without this organizing and database technology.

It may also work in actual neighborhoods. Volunteers could have gone and knocked on doors, but obviously people are going to be less inclined to do that in the cold and the rain than they will be to sit in their living room and make phone calls. And the manner in which these sort of volunteering functions were coordinated—as part of the donor outreach strategy—enabled the Obama campaign to end up with a presidential winner who had an email list of 13 million names.

No one has ever come into political office in the United States with that sort of grassroots network at their back. It's going to have impact, and they intend to use it for political organizing in a manner that will last long past election day—which means that the campaign finance piece is essentially an integrated piece of an overall system of political engagement. That is what is so interesting and exciting about the small donor revolution, and it means essentially a more bottom up politics in exactly the way that reformers have always valued.

Now, what's the role of large contributions? That was the other and last part of your question.

PROF. BREGER: I was referring to the legal problems of the Internet and small-donor donations.

MR. MCGINLEY: I believe there were some issues with contributions collected over the Internet. Some campaigns from last cycle could have done a

better job of vetting the small donations to determine their source. And if a presidential public funding bill is written and when other campaign finance bills move through the Congress—and I'm sure the FEC will take a look at this as well—there will probably be more specific regulation of this area, so that you do have to have some kind of verification like a street address. When you're shopping on the Internet, you can validate your credit card—I think we can prompt the whole system to do the same thing with donors. A check on foreign donors has to be instigated from the very first day by the campaigns. They should implement that. I think those . . .

PROF. BREGER: I just wonder about people making fraudulent donations.

MS. MACCLEERY: You're right. We should have an existing legal responsibility to be checking for fraudulent donations and they need to be very vigilant about that, and there needs to be enforcement and a structure that reinforces that. I think that's a problem with the trend of BCRA in terms of the overall scope of what could be accomplished.

In terms of the role of large donors and bundlers, they were an incredibly prevalent force in this campaign. They were a major part of President Obama's campaign fundraising. I'm looking at the two accompanying numbers here. The ultra large donors still are able, under aggregated contribution limits, even after McCain-Feingold—don't believe the hype—to give over \$100,000 into different party accounts.

So when people talk about regulated money—how they cut off money—well, the parties are doing fine. They've been able to collect plenty of money in the wake of McCain-Feingold and in fact this cycle did not—even at the state level—see any diminution in their fundraising.

The county parties that Mr. McGinley mentioned are really only a drop in the bucket in terms of overall money. They're about one percent national fundraising for the campaigns. It's true that the large donors remain a big part of fundraising. What do you do about that?

Our big idea is to establish public funding systems to reinvigorate the presidential public funding system and fix it so it actually works in time for the next presidential election, and to establish a public funding system for congressional candidates. This public funding system would essentially reinforce and lift up small donors. Any candidate could voluntarily decide whether or not to participate.

A participating candidate would have to collect a certain number of qualifying contributions—to show that they are supported by their local community, and that they're serious about their intentions to run. For the candidate, it's a significant number of contributions that they would have to collect—micro donations between \$5 and \$100 or \$5 and \$200, depending on the model.

Once a candidate has accumulated a certain amount, they could then qualify for grants of a certain amount of funds to enable them to run a campaign. They would also be eligible for matching funds for small donations. So candidates

could continue collecting money, and at some point they would stop getting the public matching funds, but could still keep collecting the small donations.

That kind of structure essentially supports small donor activity and eliminates the ability of candidates to keep collecting large contributions, which would force candidates to really go in the direction of all of the background trends toward small donors. They would have to become adept and confident in their use of the grassroots donors.

No single person or interest would determine their campaign money or political survival, which is our goal. I don't think it's too idealistic, given that we have well-functioning public funding systems in several states today: in Arizona, in Maine, in Connecticut, and in North Carolina's judicial elections.

These systems work incredibly well. The system in Connecticut had eighty percent participation in this last election cycle, its first election cycle. It also had bipartisan participation—Republicans and Democrats, grassroots candidates, some younger candidates, a more diverse candidate group in terms of race, gender, and socioeconomic backgrounds.

In Maine, for example, a single mom and a waitress got elected using public funding and now she's in the state assembly. So you have this record of state level success where the states have used similar models of public funding and we really want to see the same accomplished for Congress.

PROF. BREGER: One quick follow-up before I hand the microphone over to Mr. McGinley. I think our present experience with public financing at the national level has not been as ecstatic as you suggested. In fact, it is my understanding that if Mr. Obama had not opted out of a government-financed campaign, the one dollar check off from taxpayers may not have been enough to actually pay for the public financing obligation. So why do you think it will be different in the future?

MS. MACCLEERY: The funding mechanism is always the question. I think the program should be funded as kind of a form of public good from the treasury, which is consistent with my perspective that this would yield lots of bargains for our public policy—in terms of its impact on reducing earmarks and the corporate subsidies that we would avoid making. But the funding mechanism aside, the structure of the current presidential public financing system is in shambles. It was a program enacted in the 1970s after Watergate. It hasn't been meaningfully updated since. It really needs to be brought up to modern standards, and there is interest in doing that. We'll see how these efforts move forward, but there's a commitment on the part of our community to try to fix the program and to keep something that had worked so well. Also, in terms of competition, the historical incumbency rate in presidential elections since the program began is actually a lot lower than it is in congressional races.

The presidential system is essential, because it allows candidates to face even sitting presidents on a much more even plane. So I think it had a lot of good effects over the years, and it's a shame that it has been essentially neglected by Congress in terms of modernizing it.

PROF. BREGER: So what we have been engaged in is a discussion of small donors, hard money, big money, and public financing. Mr. McGinley, the floor is yours.

MR. MCGINLEY: Thank you. There are a couple of comments that I just wish to make first—what we see cycle after cycle is that each one has a breakthrough technology. At some point, the TV was a breakthrough technology. At the time, it was unbelievable that campaigns ran political ads on television—radio being in the same boat at one point.

But in 2006, the big breakthrough was YouTube. We saw outside groups, local committees, bloggers, candidates, and everybody else trailing their opponent with a camera. Every time someone made a mistake, which all candidates do, it immediately was posted on YouTube.

Anytime somebody saw something scandalous or something that they wanted to communicate, YouTube was the vehicle for disseminating information. This election cycle, what we really saw was the greater emphasis on the e-mail solicitations, especially on the Democratic side, which carries a lower cost per donation. But they also employed social networking sites, where people can develop lists for free by signing up, as opposed to generating the costs of sending out the e-mails. And so the 2008 election had its own technological advance. What it will be in 2010? We don't know. But I'm sure we're about to find out in about twelve months.

And so something will come to the fore as this cycle's technological advancement. Do technological advancements reduce costs? Yes. Do they enable a greater number of people to participate in the political process? Absolutely. And I think we all applaud that—whether it's people expressing their own views on YouTube, or on the social networking sites like Facebook, or just making small donor donations to the candidates or the organizations that they support by credit card donations over the Internet. I think we all agree that democracy is better when it has fuller participation.

And fuller participation also happens in the money primary. You see a lot of times in the buildup to a presidential election, they will talk about the money primary. Who has the resources to actually compete in that eighteen month sprint called a presidential election? Now, it's twenty-four months. Resources are a big deal, and while the small dollar donor base—which I think we all agree is a good thing—has increased, we still need to recognize that money does promote speech. We've jumped on this analogy of a tank of gas. It's basically a trip to the corner supermarket to put up a banner ad on a website. But it's a cross country trip to run advertising on television, which is still one of the most effective ways of communicating political views.

The other thing that we need to talk about is compliance costs. As we begin to impose greater and greater restrictions—including greater and greater disclosure requirements—on not only the campaigns and party committees, but also outside groups who want to communicate their views about federal officeholders, candidates, and their positions, compliance costs go up.

And so one of the issues that we need to be thinking about is how we make their life a little bit easier. What you will find, and what most practitioners will tell you, is that the overwhelming majority of the political participants—whether it's a candidate, party, committee, or an outside group that runs advertisements—do their best to comply with the law.

One of the things that has happened with this increased regulation coupled with an increase in the penalties is that the pro-regulation groups file generic complaints with the FEC and DOJ. These groups send a preemptive letter to the DOJ and the FEC saying, "We expect you to police these people; these groups may want to exercise their First Amendment rights, but we think they have a corrupting influence on the process and we expect you to hold them accountable"—even though these folks are trying to comply.

One of the things that it has done is driven volunteers from the process. When you look at campaigns, when you look at party committees, when you look at people banding together to communicate their views, very rarely do you see the full volunteer effort—now you need to go out and get the band of professionals. You've got to hire the lawyers, which I love. You've got to hire the accountants, which the accountants love.

However, we do see one aspect where volunteering is increasing and Laura [MacCleery] identified it, talking about how campaigns are trying to utilize volunteers as opposed to paid individuals to register people or to get-out-the-vote on a particular candidate or issue. The reason for that is simple—these guys have all looked at this and they find that neighbor-to-neighbor communication is effective. If I'm calling a guy that lives up the street to say: "Hey, what are you doing? What are you doing on election day? Make sure you vote for my candidate." That's going to be a more effective communication than if I called a guy in Iowa, who I've never met before, and he looks at the caller ID and says, "Who the heck is this calling from [Washington,] D.C.?" It's going to be a much more effective communication.

So we're going to be looking at increased volunteer activities on the organizing side, but the compliance side costs are going to continue to go through the roof as long as we continue down this path.

Are party committees doing fine? I think that is a relevant question. National party committees: have they raised a lot of money? You bet they have. But pre-McCain-Feingold party committees had different buckets for different types of funds and activities. They had their federal bucket for their federal activity. They had the overhead, or allocation, accounts for the overhead; and they had the state accounts for all the activities in the different states. They helped the dogcatcher—or the guy who was running for dogcatcher—state legislatures, governors, etc. Now, under McCain-Feingold, they're using the same bucket.

So while we're looking at this—and we're concentrating on presidential politics and congressional politics—what we're not exploring is the impact at the local level. There's this whole undercurrent of local election activity where



the rubber really meets the road, the small gatherings. The county party committees are really where the neighbors are organizing themselves to support a party committee, a particular party, and also to support the party's candidate at the local level. We're not looking at the impact on them.

County parties are some of the most important party committees in the two-party structure. They are where the people who want to volunteer their time show up. They're not knocking down the door at the DNC or the RNC. They're going down the street to the county party, and the county parties are ready. These people get together, and they want to support the state and local candidates, and they raise permissible money under the state law, and they ask the volunteers to help with compliance matters and file their reports. Then comes the presidential year and a bunch of the county parties, with no federal account, want to get together and place a newspaper advertisement saying that they love President Obama. Because it's a party committee, they have to use all FEC money. They've got to satisfy all the compliance requirements—including establishing the account, scrubbing the money, vetting the donors, reporting, making sure that they comply with the disclaimer requirements. The county parties are not engaging in this type of activity because the compliance burdens are too high. They're not running the ad that references a federal candidate because of the compliance costs, number one, and they don't understand this stuff, number two. They're also on a shoestring budget because it's an all volunteer effort—they're just not doing it. They've just given up at the local level. And so, while I think it's easy for everybody to focus on the presidential level, I think we need to remember the farm teams at the state and local levels. That is where the future leaders of America are coming from.

I'm not a business guy, but my MBA buddy tells me that when running a business—imagine a large law firm—you've got to keep the ranks filled. If you eliminate one year of associates, then that gap exists as they move up through the ranks to the partnership. What we're beginning to see—and I hope to see some data and have someone look at this—and what I can tell you from personal experience with county party committees, both Democratic and Republican, is that they're not engaging in federal activities at the local levels. The concern is that the get-out-the-vote operations are all federalized. You want to put out a communication that says vote Democratic, vote Republican—it has to be paid for with federal money, FEC money. The county parties can't do that. You want to go out and register people within a certain timeframe, you can't do that. You want to make calls to your neighbors to develop a list so that we know who to contact to say get out and vote. It has to be done a certain way. We just want to run a newspaper advertisement that says we support Senator Obama for president. You can't do it. If you don't have a federal account, you can't do it.

The county parties have suffered. If you want to look at the most numerous categories of party committees, look to the county parties. Look to where the

rubber meets the road. BCRA has imposed a huge cost on these organizations and I think it's too bad.

MS. MACCLEERY: Can I respond to that?

PROF. BREGER: Very quickly, as we are "fighting the clock."

MS. MACCLEERY: I think one of the things that has been missing from the discussion so far is an articulation of why BCRA was interested in securing restrictions on soft money versus hard money and what the values were there. Because when you hear about these poor counties—you wonder, how could we have placed all these restrictions on them?

What's missing in the story are the reasons why these rules are really important. Soft money in 2000, the major presidential election leading up to the enactment of BCRA, was the single largest source of money for party ads. Fifty percent of the funds that paid for the ads were soft money. You had this enormous prevalence of essentially unregulated soft money—and when you say soft money, how did that come about? The reason why we were—why the reform community—was so upset about soft money was that essentially this little loophole had been opened in which the national parties could make some use of money that was essentially unlimited that had been given to state level or county level parties. The idea was that they could make some use of it for overhead—for administrative costs—yet this ballooned to fifty percent of the money that they were spending.

Essentially, a loophole that had gone unregulated and unclosed by the FEC had to be closed by Congress. This unlimited money was essentially undermining the whole reason why, at the federal level, Congress had enacted contribution limits in the first place. It doesn't matter if I am soliciting money as a federal candidate in \$1000 increments if, out of the other side of my mouth, I can say, "By the way, give \$500,000 to the state party and I will use it any way I like."

So that's what had happened with soft money and that's why it's so important to close down the coordination between the state or county money—where the money is not federally regulated—and the hard money contributions that you have to the federal parties. After enactment, all the evidence shows that the state parties are doing fine. There absolutely has been no diminution in their grassroots activities—so the sob stories that you're hearing are absolutely incorrect in terms of the numbers.

PROF. BREGER: This leads up to my next question. If you worry about loopholes—not just because they are loopholes—but because you fear that the loopholes are undercutting the purpose of the legislation, you have to ask: what are the purposes of McCain-Feingold? I am going to start with Mr. McGinley. There was a suggestion, and I think you raised it at one point, that the purpose of McCain-Feingold was to level the playing field so as to ensure real competition among candidates. In *Davis*, there was a suggestion that the only purpose for regulation is to prevent corruption. So I think we need to clarify the purpose of campaign finance regulation. I think our purpose, Mr.

McGinley, is not only to prevent corruption, otherwise why do we need this FEC apparatus in the first place—why can't we just allow the criminal justice system to prosecute violators? And if we do need to have this FEC apparatus regulating campaign finance as you are claiming, what are the tradeoffs?

MR. MCGINLEY: Of course, I'm just going to take a moment to respond to one thing. National party soft money was regulated. It was regulated by the states in which it was used. Some soft money was used for overhead costs, but that's because the FEC determined that the overhead costs and the staffing by political party committees was benefiting all levels: federal, state, and local.

Why did you see more soft money in the overhead? Why did you see more soft money in the staffing and the expenses by party committees? Because it was done according to the allocation formulas that the FEC established. The FEC looked at the number of candidates on the ballot. They said: "How many federal races do you have? How many state and local races do you have?" It was called the ballot composition formula and a state party with a senate election and a presidential election had a higher federal percentage than the state that just had the presidential election.

States in off-years—where they didn't have a senate election—where they just had their house races, used a larger amount of state money because they had fewer federal offices on the ballot. So the money was allocated between the federal account and the state account to pay for these types of expenses.

Make no mistake about it, it was regulated. It was reported to the states. When the money was mixed, or allocated, or the state party transferred the money from the non-federal account into the federal account to pay for allocable expenses it was reported to the FEC. There was full sunshine on the activity.

PROF. BREGER: Now, we come to my question.

MR. MCGINLEY: Now I'll answer your question. Purposes of BCRA—I think the Supreme Court has been quite thorough, and I think we've seen this in the wake of *McConnell* and *Buckley*. The sole justification for regulating political speech with campaign financing is preventing corruption or the appearance of corruption.

Have there been a couple of outliers? Sure, the *Austin* case. There are a couple of misconceptions out of *McConnell*. *McConnell* still said the only justification for regulating political speech is preventing corruption or the appearance of corruption. *McConnell* was a facial challenge to the statute. It was not an as-applied challenge. The facts were not developed. Courts are very reluctant to overturn a statute with a facial challenge. The courts defer to the legislature.

But now we're seeing as-applied challenges move up through the courts. Corruption and the appearance of corruption are still the only two bases for regulating political speech. Leveling the playing field was rejected in *Davis*. When a millionaire put up his money or her money to run for federal office and the opponent got the increased contribution level, the Court said no.

What is also interesting about *Davis* is that it was challenged on a number of grounds—First Amendment, Equal Protection and other grounds—but the Court struck down the statute on the First Amendment grounds. The opinion sticks to the First Amendment rationale for throwing it out and I think that's very significant.

Look at *Wisconsin Right to Life*. Justice Roberts' opinion is very clear: the only basis for regulating speech is corruption or the appearance of corruption. We saw a lot of different rationales put forth by the FEC and the reformers. We also saw a lot of different arguments about the advertisements that were being run, including one of my favorites where they said that because the ad doesn't really go after the candidate or use the magic words it's a more effective campaign ad. In other words, the less it looks like a campaign ad, the more effective of a campaign ad it is. To which Roberts replied, "Enough is enough." This "heads I win, tails you lose" proposition is over.

And so what would the FEC look like if I had the opportunity to reconstruct it? I think I would still probably have a number of commissioners from both parties. And probably make it an equal split because the regulation of campaign speech and activity carries with it important core values that we need to protect. But we need to prevent violations. There are regulations that are necessary—disclosure. We all think that we need to know where the money comes from for campaigns. But there are a number of instances where individuals want to speak about it and they can suffer retribution, so disclosure doesn't work. We see that with the socialist parties requesting advisory opinions excluding it from the disclosure requirements for fear of retribution.

I also put a premium on education. One of the things that we've seen in the past four years is an increased emphasis from the FEC on their batting average. How many fines are they collecting? How many people are they throwing the book at? While at the same time, they were cutting the education budget. So as they're ramping up the compliance requirements—for the campaigns, the party committees, state and county groups that have federal accounts, other people who want to just start the PACs or organize a group—they're cutting the education budget.

I have argued that the most successful year for the FEC would be one in which it collects no fines because everybody's in full compliance. That would be ideal. Well over ninety percent of the people out there are trying to comply. This stuff gets complicated quick, and it gets very onerous. Glad that we have the Office of General Counsel? Yes, but I also would force the commission to sit back and actually take a look at its mission, especially in light of the recent decisions from the Supreme Court and other federal courts.

PROF. BREGER: Mr. McGinley, we're running out of time.

MR. MCGINLEY: Okay, sure. And audits would be what audits should be—a review of money in, money out of the campaign. They should review the finances and not get into novel legal theories. I would also use the audit process as an education tool for the regulated community, as opposed to trying

to refer them for an enforcement action in an effort to generate press releases. That is not the measure of success. Total compliance should be what we aim for, not how many people we can nail to the wall.

PROF. BREGER: Ms. MacCleery, let me try to frame the conversation: what do you believe to be the purposes of the FEC and the purposes of McCain-Feingold?

MS. MACCLEERY: The purpose of all campaign finance restrictions, going back to 1907, is to address the power that money and influence have when they're concentrated in corporations and other sources, and to reduce their impact on the public process of government. A broader notion of corruption is in a significant portion of the case law, and is supported by a large number of laws that we have enacted and many cases besides *McConnell*. *Beaumont*, in 2003, says aggregated capital unduly influences politics and such influence does not stop short of corruption.

And members of Congress often talk about the influences on them, and yet none of them will admit, of course, that they are corrupt, but they hint at it, and we know corruption is a real force. Look at the headlines recently. There is massive fraud in the municipal bond market. You have [Illinois Governor Rod] Blagojevich facing an indictment. [New Mexico Governor Bill] Richardson is dealing with accusations of a pay-to-play scandal. We see evidence of scandal and fraud throughout our economy and it impacts the political officeholders most days of the week.

In Connecticut, we just won a decision in which a federal court upheld a state pay-to-play statute, which bans lobbyists from giving political contributions to those whom they would lobby. The court said, essentially, that the state's history of corruption was severe and the law's infringement on First Amendment rights was minimal because of all the other ways in which a lobbyist may participate in the political system, that the law was perfectly constitutional.

In terms of your second question about the FEC, I think that there is a very confusing thicket of rules in terms of compliance, and I would take a close look at whether or not there are clearer ways to communicate about the compliance requirements—particularly as to disclosure regimes for the federal political activities—to see if there is a way to simplify them for small gatherings of volunteers. A graduated enforcement scheme would, of course, be appropriate and is largely what is in place in practice. I also think that the structure of the FEC is impossible in terms of enforcement, because of common three-three splits along partisan lines. Basically, the structure has meant that the FEC has punted on anything that has a partisan coloration or is a difficult decision; and the FEC has been directly responsible for both the soft money problem and for 527s either by not closing or by opening loopholes. It has failed to regulate where we needed it most. Structurally, an administrator-led structure could make more sense.

PROF. BREGER: I have one last question for both of you. I have not seen an empirical study of this but I wonder—where were the 527 ads in the last election? Did they diminish because of ethical considerations?

The Fourth Circuit decided case law under *Right to Life*. The D.C. Circuit has a speech case now before it that might take an opposite view. So where do we start on the law of 527s? And as an empirical matter, do you think 527s will be back and, because we are always fighting the last war when it comes to campaign finance reform, should we be thinking now about the return of 527s?

MR. MCGINLEY: Want me to go first?

PROF. BREGER: Yes.

MR. MCGINLEY: Sure. I think one of the reasons that you didn't see outside group activity at the presidential level was in large part because of the experience of 2004. The FEC went after the outside groups, at the urging of the reform groups. The reformers and the FEC pursued novel theories that nobody believed were in place during the 2004 calendar year. For example, the FEC adopted a rule that governed contributions, providing that money received in response to a certain type of solicitation should be considered a contribution under the Act. They based it upon a case that was a disclaimer case, way back in the 1980s or 1972.

Also express advocacy—what is old is always new again. Express advocacy is a relevant topic even today. If you remember prior to the *McConnell* decision, groups filed in federal court seeking to invalidate section 100.22B, which is the alternative definition of expressed advocacy used by the FEC. This definition utilizes context and intent and frankly judges the ad based upon whether the ad feels a certain way. It doesn't actually say that, but this is my interpretation of it. It's very vague. Every federal court that has looked at it has thrown it out. In fact, one district court tried to impose a nationwide injunction against the FEC from enforcing it, but the FEC successfully argued for them to pull that back. There were a couple of circuit courts that looked at it and upheld the district court decision—throwing out the regulation. I think it was the Second and Fourth Circuits. So, in response, the FEC adopts a policy that says 100.22B doesn't apply in the Second and Fourth Circuits. This means that I can say something in Virginia, but I don't get to say it out in Colorado.

So in this legal atmosphere, here comes the FEC after the 527s and they use the major burden test from *Buckley* as a basis for enforcement. Which, if you read the *Buckley* opinion, was meant to limit the application of the election laws—not expand their application to groups that may want to discuss issues, such as candidate positions and qualifications, without expressly calling for the election or defeat of the candidates.

In fact, the *Survival Education Fund* case, which the FEC based its new contribution regulation on, said that the disclaimer was required on the solicitation at issue in the case because the solicitation said we need to help support and elect President Reagan. But the Court made clear, which the FEC

never included in any of its analysis, that the Court in no way was restricting groups from discussing the qualifications of candidates, a candidate's stance on an issue, officeholder positions on issues, or otherwise engage what everybody has come to understand as issue advocacy.

And so we had a vague, hodgepodge legal environment in 2004, where the FEC basically used the discovery process to hammer people down—we see it in the Democratic and conservative conciliation agreements. The respondents just signed the agreements in order to end the litigation. So, in 2008, everybody said we're just not going to go through that again.

Did you see activity down at the lower levels? Sure. Because it doesn't draw as much attention, I suppose. But people still want to talk about it. What is the future of this? I think in the wake of *Wisconsin Right to Life*, we are going to see groups again.

I hope the *SpeechNow.org* case will make its way up to the Supreme Court—I believe it has a shot. It's still working its way through the system. If that case is successful, I would imagine that people will band together once again to discuss the important issues.

If the *Citizens United* case is successful—it's pending before the Supreme Court right now on the disclosure provision of the electioneering communication statute that Mr. Baran talked about. The FEC said they didn't directly address this and *Citizens United* is taking the issue to the Court. If you look at *Wisconsin Right to Life*, I think there is a decent possibility that *Citizens United* will prevail. When the Court says it's narrowing the application of the statute that doesn't mean you don't have to comply with the other provisions in the statute. We'll see what happens.

How do you change the definition of what is being regulated? We'll see what happens.

PROF. BREGER: Ms. MacCleery.

MS. MACCLEERY: This issue of how much we should know about who is spending money to influence elections is an issue that is being hotly contested in the courts in many ways now. The *SpeechNow* case is ongoing, which is a challenge to limits on uncoordinated PACs. *Citizens United* is another key case. The core question on the table in many of these cases is the transparency of the political process and how much we want to know about groups that are spending money with the intent to influence elections, whether or not that communication uses a "magic word," such as vote for, against, support, or oppose. There were plenty of examples leading up to passage of BCRA of millions of dollars in spending on so-called sham issue ads—essentially communications that use particular words in order to avoid disclosing that money was being spent to influence an election.

That sort of gamesmanship was exactly what Congress was trying to fix when it enacted BCRA. The scope of that has been narrowed somewhat by the Court's decision in *Wisconsin Right to Life* and the subsequent question asked by *Citizens United* is: given that disclosure imposes only a minimal burden on

First Amendment rights, should the limits on source restrictions also constrain transparency? There is a constitutional right here, and the courts have typically said that disclosure only receives intermediate scrutiny and is one of the least restrictive ways that you can regulate campaign speech.

In fact, even in the *Wisconsin Right to Life* context, the suggestion by Mr. Baran earlier that they just couldn't do that kind of speech or they were banned from doing this kind of speech was, strictly speaking, inaccurate. It is actually only the case that in order to speak they would have had to pay for it from a separate, segregated fund and the money that may be donated into that fund is limited. So the question then becomes: do groups want to live under certain types of limits or do they want to escape limits and also escape transparency?

At a minimum, we think the Court in the pending *Citizens United* case has to draw the line. They should say there is a broader social interest in disclosure and transparency concerning who is trying to influence an election than there is in terms of the interests supporting limits; that has been true in the jurisprudence in terms of the level of scrutiny used, and this case may provide essentially a baseline for the Court in terms of this distinction, among other things it will also indicate where we are to go in the future with the disclosure and other limits cases that are pending.

PROF. BREGER: Mr. McGinley.

MR. MCGINLEY: The only thing that I wanted to say was that I can appreciate Laura [MacCleery]'s enthusiasm on the topic because obviously I have a great deal myself on the opposite side. But it's important to remember what the Supreme Court said is that intent and effect—basically why did you run the ad, what is the effect of the ad—are unconstitutional considerations. You don't get to look at that. You get to look at the four corners of the ad to decide whether or not it's regulated. That is because somebody may say something in 2006 that means one thing on a policy issue that is relevant at that immediate moment, but when you look through the prism of time in 2008 you think well, maybe they intended to influence an election. Maybe it was discussion of the Iraq war, maybe it was a discussion of [Hurricane] Katrina, maybe it was another discussion and so intent and effect is another issue. If the recipient—and this is what the Roberts opinion says—of the advertisement takes the information and decides to use it a certain way, that should not be a liability for the speaker, otherwise the speaker is just not going to speak.

If groups are going to be subject to regulation, possible criminal prosecution, or even civil fines, or the process penalty of investigation, they're just not going to speak. They're going to hedge and trim and just try not to discuss it. If you don't have clear standards, and *Buckley* says this, about what is permitted and what is prohibited, then it's subject to constitutional scrutiny and could possibly be thrown out.

In the area of political speech we need to regulate with specificity. We don't want to be vague. We don't want to be ambiguous, so that somebody later on



can second guess the intent and the effect of the political speech that the speaker engaged in.

PROF. BREGER: I have to say one thing about our panelists: they certainly aren't afraid to speak their minds. I thank you both for your insight and the provocative discussion.